IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MICHAEL FRAZIER, *et al.*, *for themselves and on behalf of all others similarly situated individuals*,

Plaintiffs,

v.

FIRST ADVANTAGE BACKGROUND SERVICES CORP.,

Defendant.

Civil Action No. 3:17cv30

DEFENDANT'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED CLASS ACTION COMPLAINT

Defendant FIRST ADVANTAGE BACKGROUND SERVICES CORP., by its attorneys and pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6), hereby submits its Memorandum of Law in Support of Its Motion to Dismiss Plaintiffs' First Amended Class Action Complaint.

INTRODUCTION AND FACTUAL BACKGROUND[1]

This action under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA") centers on the way in which First Advantage, a consumer reporting agency ("CRA"), processed background reports for applicants who were seeking employment with Wells Fargo. As part of the application process, First Advantage hosted a website and computer system for Wells Fargo. (First Am. Compl. ("FAC") ¶¶ 5, 9.) First Advantage provided all relevant content for the website, including the FCRA-mandated disclosure form that applicants were required to sign to permit Wells Fargo to obtain their employment-purposed consumer reports. (*Id.* ¶ 6.) Applicants visited the website to complete their applications and to authorize their background checks. (*Id.* ¶¶ 5, 9.) Thereafter, First Advantage prepared a background report for Wells Fargo, and, as part of that process, determined whether or not an applicant should be adjudicated as "ineligible" based on pre-defined Wells Fargo hiring criteria. (*Id.* ¶¶ 4, 9.) First Advantage then sent the report to Wells Fargo, and, after reviewing the report, Wells Fargo entered its "final hiring decision" regarding the applicant in the shared computer system. (*Id.* ¶¶ 8-9.)

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[1] For purposes of this motion only, First Advantage assumes the truth of Plaintiffs' factual allegations, which differ from those in Plaintiffs' related class action against Wells Fargo. *See Manuel v. Wells Fargo Bank, N.A.*, 123 F. Supp. 3d 810, 813-15 (E.D. Va. 2015) (discussing Wells Fargo's application process).

Plaintiffs were all class members in *Manuel v. Wells Fargo Bank, N.A.*, No. 3:14-cv-00238-REP-DJN (E.D. Va.). (*Id.* ¶ 2.) In that action, Plaintiffs alleged that Wells Fargo failed to provide proper disclosures before obtaining their background reports in violation of Section 1681b(b)(2) of the FCRA and that Wells Fargo used their background reports to code them as ineligible for hire without first sending them a copy of their reports in violation of Section 1681b(b)(3) of the FCRA. (Pls. Third Am. Compl. ¶¶ 81-87, *Manuel*, ECF No. 41.) Plaintiffs settled their claims with Wells Fargo (FAC ¶ 2), but now seek a second recovery in this action by alleging that First Advantage is responsible for similar conduct. Plaintiffs' creative pleading, however, cannot save their claims under Rules 12(b)(1) or 12(b)(6).

In Count I of their First Amended Class Action Complaint, Plaintiffs allege that First Advantage violated Section 1681b(b)(1) of the FCRA by failing to determine whether Wells Fargo's disclosure form, which contained extraneous information, complied with Section 1681b(b)(2). (*Id.* ¶¶ 6-7, 10, 147-59, 183.) Plaintiffs do not have standing to bring this claim, however, because they authorized Wells Fargo to procure their reports, and the injury they allege is not tied to the FCRA certification requirement.

Likewise, Counts II and III turn on First Advantage's alleged failure to send Plaintiffs notices prior to or on the day First Advantage allegedly adjudicated their background reports in violation of Sections 1681b(b)(3) and 1681k(a) of the FCRA. (*Id.* ¶¶ 8-10, 160-69, 196, 207.) Plaintiffs lack standing to bring these claims because they do not allege that their reports were inaccurate, and Plaintiffs' alleged injuries would exist regardless of whether First Advantage had sent the notices. Thus, the injuries are not traceable to First Advantage's conduct.

Even if Plaintiffs had standing (which they do not), they could not proceed because their First Amended Class Action Complaint fails to state a claim. As an initial matter, Plaintiffs cannot state a claim under Section 1681b(b)(1) because they concede that First Advantage obtained Wells Fargo's certification, which is all the law requires. In Count II, Plaintiffs allege that First Advantage violated Section 1681b(b)(3) because, before sending Plaintiffs' background reports to Wells Fargo, First Advantage allegedly used the reports to determine that Plaintiffs were ineligible for employment without first sending them copies of their reports and a summary of rights. (*Id.* ¶¶ 8, 196.) Section 1681b(b)(3), however, applies only to the use of a "*consumer report*," which, by definition, requires *a communication to a third party*. *See* 15 U.S.C. § 1681a(d)(1). No consumer reports existed at the time First Advantage purportedly "used" Plaintiffs' background reports because such reports had not yet been communicated to Wells Fargo. Moreover, Section 1681b(b)(3) does not apply to CRAs.

In Count III, Plaintiffs allege that First Advantage violated Section 1681k(a) by failing to send Plaintiffs notice that First Advantage was furnishing their reports containing adverse public record information *to itself* to use to determine their employment eligibility. (*Id.* ¶¶ 10, 160-64, 207.) Like Count II, this claim fails because no consumer reports existed at the time First Advantage allegedly furnished the reports to itself and because Section 1681k(a) does not apply to a CRA's internal processing of reports. Rather, Section 1681k(a) applies only when a CRA who fails to used strict procedures sends an employment report containing adverse information to a *third party*.

Finally, because Counts I, II, and III raise novel legal theories that have not been accepted by any court or agency, Plaintiffs cannot establish willfulness. For these reasons and those stated below, Plaintiffs' First Amended Class Action Complaint should be dismissed.

ARGUMENT

I. STANDARD FOR DISMISSAL UNDER RULE 12(B)(1) AND 12(B)(6).

To survive a motion to dismiss, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A court must accept all of the complaint's well-pleaded facts as true but may disregard any conclusions, legal or otherwise. *See Ashcroft v. Iqbal*, 556 U.S. 662, 667-68 (2009). A plaintiff must allege facts sufficient "to raise a right to relief above the speculative level" to assert a claim that is "plausible on its face" rather than merely "conceivable." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). Thus, the plaintiff must "allege facts sufficient to state all the elements of [his or] her claim." *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003) (citation omitted).

For statutory interpretation, the Court must start with the plain and unambiguous language of the statute. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). "[W]hen the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." *Id.*

(quotations omitted). Courts must presume that Congress used words according to their ordinary meaning. *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1706-07 (2012). Further, in accordance with the principle of *noscitur a sociis*, courts must resolve the meaning of statutory phrases by referring to the surrounding text. *BP Prods. N. Am., Inc. v. Stanley*, 669 F.3d 184, 190 (4th Cir. 2012).

II. PLAINTIFFS LACK ARTICLE III STANDING.

A. Article III Standing Requires More Than A Statutory Violation.

To establish standing, Plaintiffs must show that they suffered a concrete, real-world injury that is traceable to First Advantage's conduct and for which they have a legal remedy. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). A plaintiff cannot plead an injury in fact merely by alleging the violation of a statutory right. *Id.* at 1549. "Article III standing requires a concrete injury *even in the context of a statutory violation*." *Id.* (emphasis added). "Congress's role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* Although Congress can elevate intangible harms by creating a remedy for them, those harms must exist independently of the statute. *Id.*

Thus, a plaintiff alleging a statutory violation "usually must plead an additional injury in order to satisfy the concreteness requirement." *Dilday v. DirecTV, LLC,* No. 3:16-cv-996-HEH, 2017 WL 1190916, at *2 (E.D. Va. Mar. 29, 2017). In rare circumstances, "where the legislature has codified causes of action with intangible harms where recovery was long permitted at common law," merely pleading the violation of a statutory right is sufficient to establish concreteness. *Id.* In those cases, the intangible harm existed before the statutory right was codified, and the courts had long provided recovery for that harm under the common law. *See id.*

However, "absent this narrow exception where Congress has codified a common law intangible injury, standing only exists for a statutory violation where the plaintiff has also alleged an additional concrete harm." *Id.* at *3; *see also Coleman v. Charlottesville Bureau of Credits, Inc.*, No. 3:17CV147-HEH, 2017 WL 1381666, at *3 (E.D. Va. Apr. 17, 2017) (same).

Consequently, a statutory violation "that causes no harm does not trigger a federal case." *Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724, 727 n.2 (7th Cir. 2016); *see Spokeo*, 136 S. Ct at 1550 (holding that some statutory violations "result in no harm"). For example, in *Spokeo*, the United States Supreme Court stated that a CRA's violation of the FCRA's notice provisions does not cause an injury in fact if the consumer's report is "entirely accurate." 136 S. Ct. at 1550. The Supreme Court also stated that even the dissemination of inaccurate information will not always result in a concrete harm. *Id.*

Therefore, to establish standing, Plaintiffs must show that First Advantage's alleged violations caused them a concrete injury apart from the statutory violation. *Beck v. McDonald*, 848 F.3d 262, 271, 278 (4th Cir. 2017) (ruling that plaintiffs lacked Article III standing and noting that "[t]he complainant must allege an injury to himself that is distinct and palpable, as opposed to merely abstract"). Further, Plaintiffs must show that the injury is traceable to First Advantage's alleged violation rather than to the "decisions and actions of third parties not before this court." *Lane v. Holder*, 703 F.3d 668, 673-74 (4th Cir. 2012) (holding that plaintiffs could not demonstrate traceability because "any harm to [them] results from the actions of third parties").

B. Plaintiffs Did Not Suffer A Concrete Injury Under Section 1681b(b)(1) Because They Authorized Wells Fargo To Procure Their Reports.

Section 1681b(b)(1)'s certification requirement does not codify a common law cause of action. The failure to obtain a certification that a third party had provided an individual a clear and conspicuous stand-alone disclosure and obtained his/her authorization to procure a background report for employment purposes is not an intangible injury for which recovery has been permitted at common law. *See Dilday*, 2017 WL 1190916 at *4 (rejecting plaintiff's assertion that Section 1681b codifies a pre-existing "right to privacy" because "the common law does not permit suit for merely sharing private information with a single third party").[2] Thus, Plaintiffs must show "an additional concrete harm" independent of the alleged statutory violation. *Id.* Plaintiffs have not made this showing.

Plaintiffs concede that they signed Wells Fargo's disclosure form (FAC ¶ 150), and they do not allege that they did not understand the form. In this context, courts have uniformly held that a plaintiff does not have standing to sue for a violation of Section 1681b(b)(1). *See, e.g.*, *Kirchner v. First Advantage Background Servs. Corp.*, No. CV 2:14-1437 WBS EFB, 2016 WL 6766944, at *2 (E.D. Cal. Nov. 14, 2016); *Larroque v. First Advantage LNS Screening Sols., Inc.*, No. 15-CV-04684 JSC, 2016 WL 4577257, at *5 (N.D. Cal. Sept. 2, 2016); *Disalvo v. Intellicorp Records, Inc.*, No. 1:16 CV 1697, 2016 WL 5405258, at *3 (N.D. Ohio Sept. 27, 2016).

In *Kirchner*, the plaintiff alleged that the user's consent form did not comply with Section 1681b(b)(2), and that First Advantage had failed to obtain a valid certification under Section 1681b(b)(1). 2016 WL 6766944 at *1. The court held that the plaintiff did not allege that the improper certification (as opposed to the user's improper consent form) resulted in any adverse consequences to the plaintiff. *Id.* at *2. The court further held that, even if First Advantage had caused the user to violate Section 1681b(b)(2), the plaintiff had not suffered any privacy or informational injury because the form plainly disclosed that the user would procure plaintiff's

[2] Plaintiffs' claim also has no foundation in the common law because they complain about the reporting of *public* information. (*See* FAC ¶¶ 8, 35.)

report for employment purposes and the plaintiff had signed the consent form. *Id.* at *3. The court pointed out that the plaintiff did not allege that the he was confused by the form or that his report contained any inaccurate information. *See id.*

Similarly, in *Larroque,* the court held that a plaintiff suing for improper certification where the user's consent form contained extraneous information did not have a concrete injury because she signed the consent form. *See* 2016 WL 4577257, at *5. The court reasoned that, by "agree[ing] to the release of her private information," the plaintiff had "eliminat[ed] any argument that her privacy was somehow invaded." *Id.* Similarly, in *DiSalvo,* the court held that a plaintiff did not have standing to sue for improper certification because he did not allege that his report was inaccurate or that he had not signed a consent form. 2016 WL 5405258, at *3.

Like the *Kirchner* and *Larroque* plaintiffs, Plaintiffs allege that the consent forms at issue disclosed that Wells Fargo would obtain Plaintiffs' background reports for employment purposes. (FAC ¶ 150.) In addition, like the *Kirchner* plaintiff, Plaintiffs do not allege that they were confused by the consent form. Moreover, like the plaintiffs in *Kirchner* and *Disalvo,* Plaintiffs do not allege that their reports were inaccurate. Accordingly, there was no unauthorized invasion of Plaintiffs' privacy, and they lack standing to sue under Section 1681b(b)(1).

Futher, Plaintiffs lack standing to bring their Section 1681b(b)(1) claim because they cannot establish that their injuries are tied to the certification requirements set forth in Section 1681b(b)(1). Plaintiffs allege that "the defective form injured the Plaintiffs … when it deprived them of their FCRA-guaranteed rights that their employment-purposed consumer reports are only to be procured by a specific, stand-alone disclosure and authorization" and that their "right to privacy" was "invaded" when their reports were provided "without proper authorization."

(FAC ¶¶ 154, 157.) But the duty to obtain consumer authorization falls on the entity procuring the report under Section 1681b(b)(2) (*i.e.*, Wells Fargo), not on the CRA furnishing the report under Section 1681b(b)(1) (*i.e.*, First Advantage). *See Kirchner*, 2016 WL 6766944 at *2-3 (distinguishing between injuries caused by Section 1681b(b)(1) and (b)(2) violations). Plaintiffs acknowledge this fact by alleging that Wells Fargo's "defective form" is what "resulted in their consumer reports being issued without the appropriate authorization for that the [*sic*] access of the reports." (FAC ¶ 155.) Consequently, Plaintiffs' injuries resulted from the actions of a third party that are not traceable to the certification First Advantage obtained. *Lane*, 703 F.3d at 673. For these reasons, Plaintiffs cannot establish standing to proceed with their Section 1681b(b)(1) claim.

C. Plaintiffs Were Not Injured Under Sections 1681b(b)(3) and 1681k Because They Do Not Allege That Their Reports Were Inaccurate or Incomplete.

Although Plaintiffs allege that First Advantage's failure to provide them notice under Sections 1681b(b)(3) and 1681k "deprived them of the ability to dispute inaccurate information in their reports," Plaintiffs do not allege that their reports were inaccurate in any way. *Spokeo* instructs that a CRA's failure to provide mandated notices would "result in no harm" if the consumer's report was "entirely accurate." *Spokeo*, 136 S. Ct. at 1550. Similarly, this Court has held that, if a consumer's report does not include incomplete or out-of-date information, the plaintiff "does not . . . have standing to bring suit" under Section 1681k(a) because "there is no harm to the consumer" from the lack of notice. *Henderson v. Corelogic Nat'l Background Data, LLC*, No. 3:12CV97, 2016 WL 4611570, at *6 (E.D. Va. Sept. 2, 2016).

In *Witt v. CoreLogic SafeRent, LLC*, the Court distinguished between a plaintiff who had alleged that her report contained incomplete information and those who had not. No. 3:15-cv-386, 2016 WL 4424955, at *8-10 (E.D. Va. Aug. 18, 2016). The Court held that, because the latter plaintiffs had failed to allege that the CRA had "furnished incomplete reports about them, they ha[d] failed to plausibly allege that (1) they suffered any particularized injury, and (2) any damage to their employment prospects was traceable to a statutory violation by [the CRA]." *Id.* at *9 (emphasis in original). The Court reasoned that, without an incomplete report, the plaintiffs could not show "they were entitled to notice" and thus had "not demonstrated a particularized information injury." *Id.* at *10. The Court rejected the plaintiffs' theory of "informational injury" because, taken to its logical conclusion, the theory would mean that "any consumer who was the subject of any report" could bring a claim for lack of notice "without alleging any specific deficiencies in his or her report." *Id.* (emphasis in original).

The reasoning in *Spokeo*, *Henderson*, and *Witt* applies with equal force to Section 1681b(b)(3) because the purpose of providing notice is "'so that the consumer may rectify any inaccuracies in the report.'" *Milbourne v. JRK Residential Am., LLC*, No. 3:12cv861, 2014 WL 5529731, at *3 (E.D. Va. Oct. 31, 2014) (quoting *Beverly v. Wal-Mart Stores, Inc.*, No. 3:07-cv-469, 2008 WL 149032, at *4 (E.D. Va. Jan. 11, 2008)). For that reason, in *Lee v. Hertz Corp.*, the district court dismissed Section 1681b(b)(3) claims for lack of standing because the plaintiffs did not "contest the accuracy of" their consumer reports. No. 15-cv-04562-BLF, 2016 WL 7034060, at *6 (N.D. Cal. Dec. 2, 2016); *see also Long v. Se. Penn. Transp. Auth.*, No. 16-1991, 2017 WL 1332716, at *4-5 (E.D. Pa. Apr. 5, 2017) (dismissing Section 1681b(b)(3) claim for lack of standing because plaintiffs "do not allege that their reports were inaccurate in any way"); *Boergert v. Kelly Servs., Inc.*, No. 2:15-cv-04185-NKL, 2016 WL 6693104, at *4 (W.D. Mo. Nov. 14, 2016) (same); *cf. Clark v. Trans Union, LLC,* No. 3:15cv391, 2016 WL 7197391, at *11 (E.D. Va. Dec. 9, 2016) (denying motion to dismiss Section 1681g(a) claim because defendant's failure to disclose the source of information deprived plaintiff of her right to correct "inaccurate information" in her report). Because Plaintiffs do not allege that their reports were inaccurate or incomplete, Plaintiffs lack a concrete injury.

Even if Plaintiffs' reports were inaccurate or incomplete, Plaintiffs would still lack standing because the harms they allege are not tied to the violations they assert. Specifically, Section 1681b(b)(3) requires a user to send a copy of the report and a description of certain rights to the consumer. Section 1681k(a)(1) requires a CRA to send a notice informing the consumer that public record information is being reported to a user, along with information about the name and address of such user. Plaintiffs allege that First Advantage's failure to provide notice deprived them of the opportunity to discuss their reports "with Wells Fargo." (FAC ¶¶ 160, 166-67.) Because Plaintiffs allege that First Advantage "used" their reports, however, the notices at issue would have only mentioned First Advantage and not Wells Fargo in accordance with Sections 1681b(b)(3) and k(a). (*Id.* ¶¶ 8, 10, 196, 207.)

Plaintiffs contend that First Advantage should have sent them a copy of the report that First Advantage used; notified them that First Advantage had included adverse public record information in that report and had furnished the report to itself; and provided First Advantage's name and address. The underlying premise of this theory is false and illogical, but, in any event, these notices do not involve Wells Fargo and would not have led Plaintiffs to believe that their reports had been sent to Wells Fargo. Thus, First Advantage's conduct could not have caused Plaintiffs' alleged injury. For these reasons, Plaintiffs lack standing to bring their claims.

III. PLAINTIFFS FAIL TO STATE A CLAIM UNDER SECTION 1681B(B)(1).

Section 1681b(b)(1) requires the CRA to have the user certify its compliance with Section 1681b(b)'s disclosure and authorization and adverse action provisions and with federal and state non-discrimination laws. Section 1681b(b)(1)(A) provides that a CRA may furnish a consumer report for employment purposes only if:

> (A) the person who obtains such report from the agency certifies to the agency that—
>
> > (i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and
> >
> > (ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and

15 U.S.C. § 1681b(b)(1)(A). The plain text of the statute requires a certification and nothing more. Plaintiffs admit that First Advantage obtained Wells Fargo's certification. (FAC ¶ 26.) Therefore, their Section 1681b(b)(1) claim fails as a matter of law.

Although Plaintiffs assert that First Advantage had a duty to ensure Wells Fargo's compliance, this is not the law. Had Congress intended to require a CRA to ensure that Section 1681b(b)(1) certifications were correct, Congress would have drafted the section to require CRAs to verify the certification or to prohibit CRAs from furnishing a consumer report if they had reason to believe the certification was invalid. For example, Section 1681e(a) requires CRAs to obtain certifications that a user seeks consumer reports for permissible purposes only. In addition, Section 1681e(a) requires a CRA to "make a reasonable effort to verify . . . the uses certified by [the] user prior to furnishing such user a consumer report" and prohibits a CRA from furnishing a consumer report to the user if the CRA "has reasonable grounds for believing that the consumer report will not be used" for a permissible purpose. Unlike Section 1681e(a), Section 1681b(b)(1) does not require a CRA to take any efforts to verify a user's certification. Section 1681b(b)(1) merely requires a certification.

This interpretation comports with the plain text as well as common sense. Plaintiffs' theory is nothing more than an attempt to bootstrap Section 1681b(b)(2) and (b)(3) liability on to Section 1681b(b)(1). Plaintiffs have already recovered from Wells Fargo for the alleged violations of Section 1681b(b)(2) and (3), and they should not be permitted to recover again from First Advantage. Accordingly, Count I should be dismissed with prejudice.

IV. PLAINTIFFS FAIL TO STATE A CLAIM UNDER SECTION 1681B(B)(3).

A. Section 1681b(b)(3) Applies Only to Users of Consumer Reports.

Section 1681b(b) contains three subsections that set out separate and independent duties imposed on CRAs and separate and independent duties imposed on employers. By its terms, Section (b)(1) is the only one of these three subsections that applies to CRAs. Sections (b)(2) and (b)(3), on the other hand, impose notice and disclosure requirements upon *users* of information in a consumer report, *i.e.*, employers and prospective employers.

Section 1681b(b)(3) provides, in relevant part, the following "[c]onditions on use for adverse actions":

> Except as provided in subparagraph (B), ***in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide*** to the consumer to whom the report relates -- (i) a copy of the report; and (ii) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Bureau under section 1681g(c)(3) of this title.

15 U.S.C. § 1681b(b)(3)(A) (emphasis added).

By its clear terms, Section 1681b(b)(3) imposes notice requirements upon *users* of information in a consumer report. In the employment context, *users* can only be employers and prospective employers; those are the only entities that can actually take, and therefore intend to take, employment-related adverse action. 15 U.S.C. § 1681b(b)(3); *see also* H.R. Rep. No. 103-486, 103d Cong., 2d Sess. 30-31 (1994) ("The bill also triggers special provisions when an *employer* contemplates taking adverse action based in whole or in part on a consumer report. Specifically, before taking adverse action regarding the consumer's current or prospective employment, an *employer* must provide to the consumer a copy of the report and a written description of the consumer's rights under the FCRA") (emphasis added). First Advantage is not, and cannot be, a "user" of its own background reports because it does not make employment decisions with respect to the applicants on whom it prepares background reports. Those decisions are made by the applicants' actual or prospective employers.

It therefore flows logically that *employers*, the entities that *use* a consumer's report, are the only entities who can *use* a consumer report to "intend" and actually effectuate final employment decisions (*i.e.*, "adverse actions"). A CRA does not have any reason or ability to "intend" to take an adverse action against an applicant with whom it has no prospective employment relationship. In other words, a CRA cannot "intend" to do something that, by definition, it cannot do. *See Costa v. Family Dollar Stores of Va., Inc.*, 195 F. Supp. 3d 841, 846-47 (E.D. Va. 2016) (distinguishing, in the context of coding an applicant as "not recommended" for employment, between the formation of intent to take an adverse action and the adverse action itself). Section 1681b(b)(3), therefore, relates to the *employer* and not the CRA, which cannot make an ultimate employment decision for a third party. Without the employer's decision or action, there can be *no* adverse action.

The very structure of Section 1681b(b) confirms this interplay between an employer's obligations and those of a CRA. In stark contrast to Sections 1681b(b)(2) and b(b)(3), Section 1681b(b)(1) expressly refers to a "consumer reporting agency," allowing it to furnish a consumer report for employment purposes only for a permissible purpose and only when an employer certifies compliance with its duties under Sections 1681b(b)(2) and b(b)(3). 15 U.S.C. § 1681b(b)(1). If a CRA could be a "user" for purposes of Section 1681b(b)(2) and b(b)(3), there would be no need for the CRA to obtain a statement from itself certifying compliance with those subsections.

Similarly, Section 1681m(a) unequivocally establishes the distinction between users and CRAs. The section requires "users taking adverse actions on the basis of information contained in consumer reports" to "provide to the consumer . . . a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken." 15 U.S.C. § 1681m(a). If CRAs could be users who take adverse actions, Section 1681m(a) would require CRAs to lie to consumers. That cannot have been Congress's intent. Because the structure of Section 1681b(b) unambiguously separates and describes the obligations of CRAs (Section (b)(1)) and employers (Sections (b)(2) and (3)), Plaintiffs' attempt to assert a claim against First Advantage under Section 1681b(b)(3) in Count II must fail.

Other courts have reached the same conclusion. For example, in *Muir v. Early Warning Services, LLC*, the district court rejected a plaintiff's attempt to impose Section 1681b(b)(3) liability on First Advantage for the reports it furnished to Wells Fargo. No. CV 16-521 (SRC), 2016 WL 4967792, at *1 (D.N.J. Sept. 16, 2016). In *Muir*, First Advantage furnished Wells Fargo with a consumer report that included adverse employment information about the plaintiff. *Id.* In creating the report, First Advantage obtained a third-party report stating that the plaintiff had been terminated from her prior job for internal fraud. *Id.* The third-party report assigned the plaintiff a "severity level" of 100 and included a decision message to "Decline" the plaintiff's application. *Id.* First Advantage included the third party's severity determination and decision message in its consumer report to Wells Fargo. *Id.* at *1, 4. After Wells Fargo rescinded the plaintiff's employment offer based on the report, the plaintiff sued First Advantage, alleging it "used" her report to adjudicate her application by "making a determination about [her] eligibility for employment" and then "generating a decline applicant and/or elevated severity message" to

Wells Fargo. *Id.* at *4. She alleged that both the determination and the message constituted adverse actions. *Id.*

The district court dismissed the plaintiff's claim, holding that "CRAs do not become users based upon the content of the reports they generate." *See id.* at *5 (citing 15 U.S.C. § 1681k). The court reasoned that holding otherwise "collapses statutory distinctions between CRAs and users, turning every CRA into a user, at least to the extent that there is anything unfavorable in the consumer report." *Id.* The court explained that treating CRAs as users would require multiple adverse action notices "in conjunction with a single detrimental outcome" and "would make compliance with the FCRA's pre-adverse notice requirements a shifting target dependent on the after-the-fact determinations of a disappointed applicant in how to parse an employment decision into a series of adverse steps." *Id.* at *4.

Similarly, in *Obabueki v. International Business Machines Corp.*, the district court discussed the interplay between Section 1681b(b)'s subsections and held that "contrary to plaintiff's suggestion, each of the subsections need not, and does not, prescribe obligations for both [consumer reporting] agencies and users [such as employers]. *The second and third subsections both affect users. . . . On the other hand, the first subsection . . . sets forth obligations that an agency must satisfy before furnishing a consumer report.*" 145 F. Supp. 2d 371, 393 (S.D.N.Y. 2001) (emphasis added).

Likewise, in *Williams v. First Advantage LNS Screening Solutions, Inc.*, the court dismissed a consumer's Section 1681b(b)(3) claim against First Advantage, finding that the term "person" in Section 1681b(b)(3) refers to employers, not CRAs. No. 1:13-cv-222-MW-GRJ, 2015 WL 9692872, at *5-8 (N.D. Fla. Oct. 14, 2015). The court explained that "CRAs like First Advantage need not send pre-adverse action notices for actions taken in their capacities as

CRAs—sending consumer reports to employers, collecting information about consumers, etc. While it is certainly true that a CRA is, under a naïve reading of [Section] 1681a, a 'person,' it is also true that 'oftentimes the meaning - or ambiguity - of certain words or phrases may only become evident when placed in context."' *Id.* at *8.[3]

Plaintiffs allege that First Advantage is a CRA, that Plaintiffs applied for employment with Wells Fargo, and that Wells Fargo, not First Advantage, made the "final hiring decision" as to whether to hire Plaintiffs. (FAC ¶¶ 1, 5, 9.) These allegations establish that First Advantage acted as a CRA and did not decide whether Wells Fargo would hire Plaintiffs. *See also Manuel*, 123 F. Supp. 3d at 815 ("Wells Fargo's Background Screening Compliance Team then reviewed these results [from First Advantage] and determined whether the applicant appeared to be ineligible for employment based on the contents of the background check"). Thus, Plaintiffs do not have a plausible basis for liability against First Advantage.

Plaintiffs have signaled that *Goode v. LexisNexis Risk & Information Analytics Group, Inc.* will be the backbone of their opposition. (FAC ¶ 29) Contrary to Section 1681b(b)'s plain terms, meaning, and purpose, the *Goode* court concluded that CRAs could be liable as "users" under the statute and could take adverse actions against those with whom they have no employment relationship. 848 F. Supp. 2d 532, 542 (E.D. Pa. 2012). The court's conclusion was based on an erroneously expansive interpretation of the statute: the court posited that because Section 1681b(b)(3) does not *expressly* exclude CRAs from its coverage, CRAs should

[3] Also, the FTC has determined that Section 1681b(b)(3) "imposes a specific disclosure obligation on employers," not CRAs. 40 Years of Experience with the Fair Credit Reporting Act at 52; *see also* "Advisory Opinion to Rosen," William Haynes, FTC, Staff Op. Ltr. (June 9, 1998) (concluding that the section governs the conduct of "an employer or any other user of consumer report information obtained from a CRA"); "Advisory Opinion to Beaudette," William Haynes, FTC, Staff Op. Ltr. (June 9, 1998) (stating that employers "remain liable for any violations of the [Section 1681b(b)(3)]")).

be subject to liability under that subsection. *Id.* The *Goode* decision failed to address the interplay between the three subsections of Section 1681b(b), and even recognized that it was a "close case." 848 F. Supp. 2d at 543. The flawed reasoning in *Goode* has not been adopted by any appellate court, and was expressly rejected by the *Williams* and *Muir* courts after examining "the statute *as a whole*." *Williams*, 2015 WL 9692872 at *6 (emphasis in original); *see also Muir*, 2016 WL 4967792 at *5. Furthermore, *Goode* is distinguishable because, there, the employer "did not conduct any review of the [CRA's] adjudication," 848 F. Supp. 2d at 539, whereas, here, Plaintiffs concede that Wells Fargo independently considered First Advantage's alleged adjudication and made the "final hiring decision" as to whether to hire Plaintiffs. (FAC ¶ 9; *see also id.* ¶ 4 (alleging that Wells Fargo "later confirm[ed] and second[ed]" First Advantage's adjudication).) Accordingly, *Goode* cannot save Plaintiffs' claim.

B. Plaintiffs' Background Reports Were Not Consumer Reports When First Advantage Allegedly "Used" Them.

Even if a CRA could be a "user" of its own reports, Plaintiffs' claim would still fail because First Advantage's internal communications with respect to compiling a background report do not qualify as statutory consumer reports. Plaintiffs assert that Section 1681b(b)(3) was somehow triggered when First Advantage allegedly sent Plaintiffs' reports to itself and determined Plaintiffs' eligibility *before* First Advantage sent Plaintiffs' reports to Wells Fargo. (*Id.* ¶¶ 4, 9, 28-31.) But a CRA's internal communications are not consumer reports. Consistent with the FCRA's delineation of CRAs and users as separate entities, the FCRA defines a "consumer report" narrowly as:

> any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . employment purposes.

15 U.S.C. § 1681a(d)(1). "'[N]umerous courts have concluded that . . . a "consumer report" means a report disclosed to a *third party*.'" *Mostofi v. Experian Info. Sols., Inc.*, No. DKC 13–2828, 2014 WL 3571804, at *2 (D. Md. July 18, 2014) (quoting *Norman v. Lyons*, No. 3:12-CV-4294-B, 2013 WL 655058, at *2 (N.D. Tex. Feb. 22, 2013) (emphasis added)).

Additionally, a CRA does not violate Section 1681b by "sharing Plaintiff's credit file amongst its offices," because that file is not a consumer report. *Id.* The definition of consumer report expressly "contemplates that the information will be *used* to determine a consumer's eligibility for . . . employment purposes, a requirement which seemingly mandates that the information be provided to a third-party user." *Renniger v. Chexsystems*, Case No. 98 C 669, 1998 WL 295497, at *5 (N.D. Ill. May 22, 1998) (emphasis in original). "In short, where there is no evidence of disclosure to a third party, the plaintiff cannot establish the existence of a consumer report." *Wantz v. Experian Info. Sols.*, 386 F.3d 829, 833-34 (7th Cir. 2004), *abrogated on other grounds by Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007).

The adjudication Plaintiffs complain of occurred within First Advantage before Plaintiffs' background reports were communicated to Wells Fargo. (*See* FAC ¶ 4.) Thus, the background reports were not "consumer reports" at that time, and, consequently, Plaintiffs cannot show that First Advantage used a consumer report to take adverse action against them.

V. PLAINTIFFS FAIL TO STATE A CLAIM UNDER SECTION 1681K.

A. Plaintiffs Do Not Allege That Their Background Reports Contained Incomplete or Out-of-Date Public Record Information.

To prevail under Section 1681k(a), a plaintiff must show that his report contained incomplete or outdated information. *Henderson v. Corelogic Nat'l Background Data, LLC*, 161 F. Supp. 3d 389, 402 (E.D. Va. 2016); *see also Kelly v. Bus. Info. Grp., Inc.*, No. CV 15-6668, 2016 WL 7404470, at *4 (E.D. Pa. Dec. 22, 2016) (same). Although Plaintiffs generally allege that "First Advantage buys bulk data consisting of incomplete and outdated abstracts of courthouse records" (FAC ¶ 162), Plaintiffs do not allege that First Advantage "furnished incomplete reports about them" (or anyone at all). *Witt*, 2016 WL 4424955, at *9 (emphasis in original). As a result, Plaintiffs fail to state a claim under Section 1681k.

B. Wells Fargo, Not First Advantage, Used the Background Reports.

Plaintiffs' Section 1681k claim also fails for the same reasons as their Section 1681b(b)(3) claim: First Advantage was not the "user," and the alleged "use" did not involve "consumer reports." As with their Section 1681b(b)(3) claim, Plaintiffs ignore Section 1681k's text and the FCRA's structure in an attempt to create a claim where none exists. Section 1681k provides that, when a CRA furnishes adverse public record information for employment purposes without maintaining strict procedures, the CRA must:

> at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported

15 U.S.C. § 1681k(a)(1).

A CRA's obligation to comply with Section 1681k(a)(1) does not arise unless and until the CRA furnishes a report to a "user." In addition, by using the definite article "the," "Congress made clear that '[t]here can be only one'" user per report and thus only one notice per report. *Sijapati v. Boente*, 848 F.3d 210, 216 (4th Cir. 2017). This is consistent with the provision's requirement that the CRA identify the name and address of the *third party* to whom the CRA is sending the report. *See also* 15 U.S.C. § 1681b(b)(1)-(3) (describing precaution to ensure "the" consumer report will be used by "the" user for a particular permissible purpose). As explained in Part IV, *supra*, First Advantage was *never* a "user," much less "*the* user" of Plaintiffs' reports, and no court has ever held a CRA to be a "user" under Section 1681k. Because Section 1681k does not apply until a CRA reports information to a third-party user, Count III should be dismissed with prejudice.

VI. PLAINTIFFS CANNOT SHOW WILLFULNESS.

A. Applicable Standard of Law.

For a violation to be "willful," it must have been knowing or reckless. *See Safeco*, 551 U.S. at 57-58. Recklessness, in turn, consists of "action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Id.* at 68 (quotation marks omitted). According to the Supreme Court, "a company subject to the FCRA does not act in reckless disregard of [the FCRA] unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Id.* at 69.

The *Safeco* test is one of "objective reasonableness." *Id.* at 70-71. The *Safeco* "objectively reasonable" standard considers three factors: (1) whether there is ambiguity of the FCRA provisions at issue; (2) whether defendant's reading has a foundation in the statutory text; and (3) whether defendant had the benefit of guidance from the courts of appeals or the FTC. *Id.* at 69-70 n.20.

The Supreme Court has made clear that even where a defendant's interpretation of a statute is wrong, a violation is not "willful" if the statutory provisions at issue are "less-than-pellucid," and a defendant's interpretation has a statutory foundation. *Id.* at 69-71. In determining whether or not First Advantage's alleged violation of the FCRA is willful, an "interpretation that could reasonably have found support in the courts" is sufficient to defeat an allegation of "willful" violation of the law. *Id.* at 70 n.20; *see also* Opinion, *Henderson v. Trans Union, LLC*, Case No. 3:14-cv-00679-JAG (E.D. Va. May 2, 2017) (granting defendant summary judgment because two courts had found interpretations similar to defendant's to be objectively reasonable).

B. Plaintiffs Cannot Show A Willful Violation.

Even if this Court were to hold that First Advantage could somehow be liable under Plaintiffs' theories (which it should not), Plaintiffs nevertheless have not alleged sufficient facts that First Advantage's conduct was willful. Indeed, First Advantage's interpretation of Sections 1681b(b)(1), 1681b(b)(3), and 1681k have firm foundations in the statutory text. In contrast, Plaintiffs' theories represent "novel" interpretations of the law that have never been adopted by any court to First Advantage's knowledge. Specifically, Section 1681b(b)(1) requires only a certification, and First Advantage obtained that certification. *See supra* at Section III. No court has held that Section 1681b(b)(1) requires CRAs to evaluate a user's compliance, and the FTC has not opined on the issue.

As for Section 1681b(b)(3), the plain text of the statute states that the obligations of Section 1681b(b)(2) apply to "users" of consumer reports, and not CRAs. *See supra* at Section IV (discussing statute and supporting case law and guidance). First Advantage's interpretation of Section 1681b(b)(3) is thus fully in line with the statutory text, the applicable case law, and the FTC's guidance. *See id.* The FTC's publications distinguishing between CRAs and users and the formation of intent and the adverse action further support First Advantage's position. *See id.* Even if First Advantage was a "user," its internal coding of Plaintiffs was not an adverse action because the coding was not a final decision. *See, e.g.*, *Costa v. Family Dollar Stores of Va., Inc.*, 195 F. Supp. 3d 841, 846-47 (E.D. Va. 2016) (holding that employer's decision to code individuals as not recommended for hire could not be considered willful). Therefore, First Advantage's interpretation was objectively reasonable.

Similarly, First Advantage's interpretation of Section 1681k(a)(1) is objectively reasonable. That plain text states that the notice requirement applies when CRAs send reports containing adverse public record information to *third parties*. Neither the FTC nor any court has suggested, much less determined, that Section 1681k(a)(1) applies to a CRA's internal processing of a report. And Plaintiffs' unsupported theory runs contrary to numerous decisions distinguishing between a CRA's internal compiling of a report and furnishing the report to the user. *See supra* at Section V.

As shown, First Advantage's interpretations are supported by the statutory text, case law, and the FTC's guidance. Thus, under *Safeco*'s "objective reasonableness" standard, Plaintiffs fail to, and cannot, establish any "willful" violation as a matter of law. Therefore, Plaintiffs' First Amended Class Action Complaint fails to state a claim for relief and must be dismissed in full and with prejudice.

CONCLUSION

For the reasons stated herein, the Court should dismiss Plaintiffs' First Amended Class Action Complaint with prejudice.

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Date: May 5, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MICHAEL FRAZIER, *et al.*, *for themselves and on behalf of all others similarly situated individuals,* **Plaintiffs,** **v.** **FIRST ADVANTAGE BACKGROUND SERVICES CORP.,** **Defendant.**	**Civil Action No. 3:17cv30**

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2017, I electronically filed DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED CLASS ACTION COMPLAINT with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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